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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Review of the Pioneer's
Preference Rules

ET Docket No. 93-266

TO: The Commission

**REPLY COMMENTS OF
AMERICAN PERSONAL COMMUNICATIONS**

The touchstone in this proceeding, as in all others, must be the public interest. The initial comments of American Personal Communications ("APC")^{1/} showed that:

- the Commission's rulemaking and licensing processes for new services preclude the benefits that pioneers provide in other fields, and that a pioneer preference policy thus continues to be needed regardless of auctions so that spectrum-based innovation may be spurred by appropriate incentives to benefit the public;
- the public would benefit from broadband PCS preference grants being finalized because fairness must always be a cornerstone of good government and because freeing the pioneers to launch services effectively will jump-start PCS. Particularly, it will energize PCS equipment manufacturers in this country, which have lagged behind foreign equipment

^{1/} American PCS, L.P., d/b/a American Personal Communications ("APC"), a partnership between APC, Inc., the managing general partner, and The Washington Post Company, a limited partner/investor.

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suppliers who have benefitted from the earlier implementation of PCS in other countries;

- the preference awards must provide each pioneer with a spectrum block and license area that enable it to inaugurate the sort of viable, broad-vision PCS that will provide world leadership in the roll-out of this dynamic new family of wireless services, also to the American public's benefit.

Support for these propositions in the initial comments is deep and broad. The few naysayers are so clearly motivated by a desire to protect their existing turf against competition that their comments show, backhandedly, precisely why the Commission should promptly proceed to finalize the PCS pioneer grants. There is no record support for the repeal of preferences, for the retroactive application of any rule changes to broadband PCS pioneers, or for granting meager and insufficient territories and spectrum blocks to PCS pioneers.

I. SUPPORT FOR MAINTAINING THE PIONEER PREFERENCE POLICY AND FINALIZING BROADBAND PCS PREFERENCES IS OVERWHELMING.

Of the 47 commenting parties, only six support repeal of the pioneer preference policy and only three of the six -- BellSouth, GTE and Nextel -- support retroactive elimination of PCS preferences. The companies favoring repeal include some of the largest telecommunications firms in the world, which have not innovated in PCS and which simply seek to hold back competition. Southwestern Bell and Nextel, for

example, would compete against APC in the Washington/Baltimore market; not surprisingly, neither supports the concept of preferences.^{2/} BellSouth, a regional Bell operating company with extensive cellular holdings,^{3/} and GTE, another cellular behemoth, similarly argue that preferences should be repealed retroactively. And PageMart, Inc. and Paging Network, Inc., future competitors of Mobile Telecommunications Technologies, Inc. ("MTel"), predictably, oppose preferences.^{4/}

The public policy-based positions articulated by the consensus of commenters in favor of maintaining preferences

^{2/} Nextel, which now has the largest geographic holdings of any telecommunications company in the U.S., argues ardently that the pioneer preference policy should be repealed and claims, with not a scintilla of support in the record, that "administration of the pioneer's preference rules has proved unworkable." Incredibly, Nextel follows this argument by demanding that the Commission grant it a pioneer preference. See Nextel Comments, pp. 5, 7, 10.

^{3/} BellSouth makes a flat misrepresentation in alleging that APC changed its position on PCS spectrum allocations to 40 MHz after it had received a tentative preference. BellSouth Comments, p. 18 n.36. In fact, APC had initially urged an allocation of 50 MHz per licensee and moderated its view when its spectrum-sharing research demonstrated that 40 MHz would be workable. See En Banc Hearing Testimony of J. Barclay Jones, Dec. 17, 1991. The remainder of BellSouth's procedural objections are the same warmed-over arguments to which we responded fully in the pioneer preference docket months ago.

^{4/} Digital Satellite Broadcasting Corporation, a competitor of Satellite CD Radio, Inc., a pioneer preference applicant in the digital audio radio docket, also supports repeal.

stand in stark contrast to the parochial interests advocated by the few large and entrenched companies favoring repeal:

- The U.S. Small Business Administration ("SBA") notes that the naysayers "are all large businesses with access to substantial amounts of capital and would benefit dramatically from forcing smaller businesses with pioneer's preferences to relinquish them and enter an auction."^{5/} Accordingly, SBA "opposes any mid-course correction for those entities that have currently obtained preferences or those that are currently seeking preferences."^{6/}
- Members of the investment community note that "any reversal of FCC policy, such as the retroactive changing of rules on the PCS Pioneers, would send a negative signal to the investment community, shattering investors' faith in the FCC and in emerging communications companies, likely making the process of raising capital in the future much more problematic."^{7/} The "possibility of the FCC retroactively changing the existing rules adds an intolerable dose of regulatory risk and uncertainty. The signal sent to investors will be negative and

^{5/} SBA Comments, p. 2 n.2.

^{6/} Id. at 2.

^{7/} Comments of Unterberg Harris, p. 2.

capital will find other uses. Innovative wireless technologies will be left high and dry."^{8/}

- Rockwell International Corporation, a major U.S. manufacturer, argues that the "subject rulemaking has added delay and uncertainty to the deployment of broadband PCS services by the pioneer's preference applicants, causing injury to both the public who is deprived of the technological innovations and to the applicants who have relied on the Commission's representations of a preference."^{9/} Motorola and QUALCOMM similarly support the continuation of the Commission's preference policy.^{10/}

^{8/} Comments of Montgomery Securities, p. 1.

^{9/} Rockwell Comments, p. 5. Rockwell also notes that any distinction between broadband and narrowband preferences is arbitrary:

It was the timing of decisions by the Commission that resolved the narrowband issues prior to the broadband issues. Had the situation been reversed, MTel would now be facing the possibility of retroactive rule changes, while the three broadband preferences would be finalized. If, as the Commission stated, "equity" required it to finalize the grant to MTel, then equity must also require the Commission to finalize the grants to the broadband PCS pioneers. Both the narrowband and broadband pioneers operated under the current policy and representations by the Commission. The two should not now be subjected to different standards and requirements.

Id., p. 3.

^{10/} See Comments of Motorola Satellite Communications, Inc., p. 1 ("Motorola urges the Commission to apply its existing pioneer preference rules in a manner consistent with their original purpose" and reiterates its request for a

Dozens of other commenters, both preference applicants and non-applicants, support the continued application of the preference policy and the finalization of broadband PCS pioneer preferences.^{11/}

There is no basis in the now-voluminous record for repealing the preference policy and eliminating broadband PCS pioneer preferences. Regardless of whether licenses are issued by competitive bidding, the Commission's rulemaking and allocation procedures will continue to require pioneers to

preference in connection with its Iridium MSS system); Comments of QUALCOMM Incorporated.

^{11/} See, e.g., Comments of Ameritech ("it is ironic that for broadband (2 GHz) PCS, a service for which over 240 experimental licenses were granted, and over 50 applications for preferences were filed, the Commission now proposes to reverse its field and retroactively eliminate the benefits of the preference concept"); Pacific Bell and Nevada Bell ("Rescinding the pioneer preference rules would be inequitable and constitute an unfair shift in policy after many parties have invested a tremendous amount of time and money"); Advanced MobilComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (supporting retention of preference and opposing any retroactive application of rule changes -- even of those suggested by the AMT/DSSC); ArrayComm, Inc.; Henry Geller, p. 5-6 (broadband PCS pioneer preferences should be finalized because pioneers "relied on the government's rules" and "played by those rules at considerable expense to themselves"); Cablevision Systems Corp.; CELSAT, Inc.; Associated Communications Corporation; In-Flight Phone Corp.; Cox Enterprises, Inc.; Omnipoint Communications, Inc.; PCN America, Inc.; Personal Communications Network Services of New York, Inc.; Advanced Cordless Technologies, Inc.; Satellite CD Radio, Inc.; Suite 12 Group; Panhandle Telephone Cooperative, Inc.; Adams Telecom, Inc., Advanced Tel., Inc., Columbia Wireless Limited Partnership, East Ascension Telephone Co., Inc., Middle Georgia Personal Communications, Paramount Wireless Limited Partnership, Reserve Telephone Co., Inc., Reserve Telecommunications and Computer Corp., and Tri-Star Communications, Inc.; United Native American Telecommunications, Inc.; and Corporate Technology Partners.

reveal their discoveries in the public record, thereby vitiating any advantage they could have at auction. And this is true beyond doubt for broadband PCS preferences, where pioneers have donated their inventions, discoveries and genius to the public record over a four-year period. It would be unfair, arbitrary and illegal for the Commission to change course now. Broadband PCS preferences should be finalized.

II. PREFERENCES WILL BE INEFFECTIVE UNLESS THE LICENSES AWARDED WILL ENABLE LAUNCH OF AN EFFECTIVE, VIABLE SERVICE.

For the pioneer preference policy to achieve its goals, the license awarded to a pioneer must be sufficient for the pioneer effectively and promptly to provide the service or technology it has developed.^{12/} Although we believe that a 30 MHz/MTA license would be the correct award for broadband PCS pioneers, APC proposed a compromise, to which all tentative pioneers agree. Under this proposal, pioneers would receive a "carve-out" of a portion of a 30 MHz MTA -- two BTAs (or fewer or more, so long as the resulting service area has

^{12/} Some parties argue that some sort of bidding discount without any certainty that pioneer would receive a license should take the place of the certainty of a license grant to a pioneer. See, e.g., Comments of NYNEX Corp. (no benefits to pioneers at all unless they win at auction); Southwestern Bell; Cablevision Systems Corp.; Pagemart, Inc. Adoption of any of these proposals would be functionally identical to eliminating the preference policy. Without the certainty of a license grant for deserving pioneers, capital markets would refuse to fund pioneers' high-risk research and development efforts. If pioneers cannot obtain funding for their experimental activities, they will be unable to bring new services and technologies before the American public and the preference policy would fail to achieve its goal of spurring innovation.

economic integrity) -- with the remainder auctioned. No comments allege any legal, public policy, logistical or marketplace impediment to APC's fallback proposal.

The public interest would be disserved by granting pioneers a smaller service area or less spectrum. By definition, successful pioneers have a flair for innovation and a commitment to leadership. It serves the public interest to have these qualities meaningfully brought to bear on the inauguration of a new service. Providing pioneers with a 20 MHz grant in the 1850-1990 MHz band^{13/} or a 10 MHz grant in the 2100 MHz band would ensure that pioneers could participate in PCS only as catch-up, marginal players. In Washington/Baltimore, APC would have to wait to aggregate at least the Washington and Baltimore areas before launching service, wait to aggregate additional spectrum in order to resolve microwave congestion problems, and, in the case of spectrum in the 2100 MHz band, wait for equipment to be designed and fabricated.

These aggregation steps would be time-consuming, slow, expensive, uncertain, perhaps impossible, unquestionably inefficient and competitively crippling. This is so because (i) the Commission has proposed anti-enrichment restrictions on the 20 MHz and one 10 MHz BTA licenses,^{14/} (ii) these licenses could only be bid for, in the first instance, by

^{13/} See Cablevision Comments, pp. 9-11; Henry Geller Comments, p. 9.

^{14/} Two 10 MHz BTAs will be gobbled up by well-heeled cellular incumbents.

"designated entities," and (iii) the competition -- two long-entrenched cellular carriers that serve MTA-size areas, Nextel and two 30 MHz MTA licensees per market, perhaps one or both members of national consortia -- would have enormous spectrum and service area advantages. In short, the 10 MHz and 20 MHz BTA licenses clearly will take longer to develop into viable businesses and, as Dr. Stanley stated in the Commission's October 23 meeting, many may fail. Those are not the resources with which the public should want to equip the leaders in this vibrant, enormously promising new international service.

By comparison, the carve-out proposal is simple to administer, provides for an appropriate award and would enable the public to benefit from the pioneers' continued leadership in the inauguration of this wonderful new service. Accordingly, The Commission should immediately finalize broadband PCS pioneer preferences.

* * *

APC previously asked the Commission to resolve issues concerning broadband PCS preferences as quickly as possible in a First Report and Order in this docket and an order finalizing preferences in Docket 90-314.^{15/} If the

^{15/} No commenting party objected to this suggestion. Rockwell makes a parallel request that the Commission "sever from further consideration in the rulemaking, and expeditiously resolve, the issues of retroactive application of rule changes . . . as they affect the broadband PCS applicants." Rockwell Comments, p. 5. Other parties also explicitly support expedited treatment. See Comments of

Commission needs more time to consider prospective pioneer preference issues, it should not delay finalization of broadband preference grants on which it made its findings over 14 months ago. Rather, the Commission should deal with these prospective issues in a Second Report and Order and should finalize the broadband PCS preferences immediately.

Respectfully submitted,

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Omnipoint, p. 33; Cox Enterprises, Inc., p. 15; PCN America, Inc., pp. 10-11. Even Southwestern Bell recognizes the value of separate and expedited treatment of broadband PCS issues because "such matters, no doubt, are important to [pioneers'] planning process." Southwestern Bell Comments, p. 2 n.1.